Supreme Court, U.S.
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No. 031642

In The

# Supreme Court of the United States

ELLIS E. NEDER, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner was convicted by a trial which hinged on a credibility conflict between petitioner and a key government witness. The government possessed documents (six separate documents) (App. 19a-30a) which would have provided substantial impeachment of its key witness. The government owed pretrial production of these documents under *Brady v. Maryland*, 373 U.S. 83 (1963). It produced them, but did so only as buried in thousands of pages of other document production without pointing them up in any way, knowing (perhaps intending) that Neder would be unlikely to find them. Neder and his court-appointed counsel, in fact, did not find them. The government thereafter presented its witness at trial and argued his credibility knowing of the impeaching documents and knowing or believing that Neder had not found them, but still not calling his attention to them as *Brady* documents.

The questions presented are:

1. Whether *Brady* production requirements are satisfied by burying six documents of crucial impeaching evidence in thousands of pages of other documents without in any way pointing out the *Brady* nature of the six documents.

2. Whether the government can bury six *Brady* documents impeaching a key witness in thousands of pages of overall discovery production knowing (perhaps intending) that the defendant will not discover them and then call the key witness and argue his credibility at trial without citing the *Brady* documents to the defendant.

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## PETITION FOR WRIT OF CERTIORARI

Ellis E. Neder, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The decision of the Eleventh Circuit is unreported. (App. 1a). The decision of the district court is unreported. (App. 2a-17a).

## JURISDICTION

The judgment of the Eleventh Circuit was entered on February 18, 2004. This Court granted an extension to file this petition to and including June 7, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

## STATEMENT

This case presents a recurring prosecution tactic for circumvention of *Brady v. Maryland,* 373 U.S. 83 (1963) in white collar cases by production of *Brady* required documents as part of a wholesale document production through which the defendant must search in hide and seek fashion for the *Brady* material.

Neder was a land developer, who was charged with an array of tax and bank fraud offenses growing out of his development activities. The government seized thousands of documents from him and subpoenaed thousands of others by grand jury subpoenas prior to trial. All of this was produced to Neder *en masse* as pretrial discovery.

The linchpin of Neder's defense at trial was reliance upon the advice of his real estate lawyer. His real estate lawyer, appearing as a government rebuttal witness, denied giving the advice Neder claimed.

The jury's verdict hinged upon the credibility conflict between Neder and his real estate lawyer. The jury resolved this conflict against Neder and convicted him. He was sentenced to an extended period of incarceration.

The government possessed six documents during trial which could have provided significant impeachment of the lawyer. It owed disclosure and production of these items as *Brady* material. The government did produce these documents to Neder prior to trial, but only as part

of its general pretrial discovery production of thousands of documents without specifically designating the six documents in question and without pointing them out as *Brady* material. It did so knowing (perhaps intending) that Neder would be unlikely to find them on his own, which he did not. The government then called its key witness at trial and argued his credibility, apparently very effectively, without any reference to the unfound impeaching documents.

Neder was severely impaired in his review of the government's pretrial production by the conditions imposed by the government on his review. The document production was housed in a government document depository to which Neder was permitted access only during normal business hours. He also was permitted access only in the company of his CJA court-appointed counsel (one lawyer of a two person office), who could devote only so much time to Neder during normal business hours. It was predictable that Neder would not find the documents under the impairments imposed by the government.

During Neder's years of incarceration following his sentence he chafed under the belief that the government had in fact been in possession of the exonerative documents in question and had effectively thwarted his access to them by burying them in the mass of general discovery. He therefore filed a Freedom of Information Act request for the documents. To his astonishment, the government then produced them to him, long after they would have done him any good at trial.

Neder then filed a 28 U.S.C. § 2255 petition contending that the government's failure to point out the exonerative *Brady* documents and cite them to him prior to trial

constituted prosecutorial misconduct. He complained (1) that the documents had not been produced or had been produced in a way designed to minimize his chances for finding them, (2) that he had been unable to locate them despite good faith effort, (3) that the government called his real estate lawyer as a rebuttal witness knowing that Neder had been unable to locate the impeaching records, (4) that the government presented its witness without affirmatively pointing out the impeaching documents, and (5) that the government then argued to the jury the credibility of its witness without specific disclosure to anyone that it possessed significant impeachment of the witness.

The government defended against the § 2255 petition on the ground that it had produced the crucial impeachment material as part of its general pretrial discovery, albeit as six undifferentiated documents included in an overall huge document production. An FBI agent who had been one of the agents in charge of the document depository gave an affidavit that she specifically had been cognizant of the documents as part of the overall production and specifically knew they had been there.

The District Court ruled that so long as the documents had been produced at all, the government had met its *Brady* obligations. The government was held to be under no responsibility to point up any particular documents included in its document production, even though *Brady* material crucially impeaching its key witness. The government's failure to specifically designate and point out the documents in question was held to be no basis for any finding of prosecutive misconduct. Neder was denied even the right to call his prosecutor (who was in the hallway outside the courtroom under subpoena) for inquiry

whether he had deliberately sought to circumvent *Brady* and had knowingly exploited his circumvention to advantage. The District Court then denied a Certificate of Appealability ("COA").

Neder applied to the Eleventh Circuit for a COA. The Eleventh Circuit (by Judge Gerald B. Tjoflat) also denied his request for a COA, without explanation.

## REASONS FOR GRANTING THE WRIT

*Brady* and its progeny, and the salutary purposes accomplished by this Court through *Brady*, are vulnerable to serious watering down in white collar cases by the manner of purported compliance employed by the government here. This practice is an ongoing *Brady* problem, and protective action by this Court is needed to secure *Brady*'s fundamental objective in cases involving large volumes of evidence, which almost *per se* includes a high percentage of federal and state white collar prosecutions.

Burying critical documents in thousands and thousands of other discovery is tantamount in a real sense to concealment. In dealing with documents which are known or reasonably should be known by the prosecution to be critically exonerative, the prosecution ought not to be entitled to shift the burden of searching out the exonerating materials to defense counsel. As stated by Justice Ginsburg in *Banks v. Dretke*, 2004 WL 330040 (decided February 24, 2004), "When the police or prosecutors conceal significant exculpatory or impeaching material in the state's possession, it is ordinarily incumbent on the state to set the record straight." Justice Ginsburg further stated "A rule thus declaring that 'prosecutor may hide,

defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."

The problem is especially acute where, as here, the defendant is represented by appointed counsel. *See*, *United States v. Burnside*, 824 F. Supp 1215 (N.D. Ill. 1993) where it was stated that "The efficient use of Criminal Justice Act funds to pay and reimburse defense counsel is a very practical reason why our system of justice should require the government's counsel to provide the *Brady* and *Giglio* information to the defense counsel rather than have defense counsel use their time and the sparse CJA funds to try to gather information favorable to the defense which is already in the government counsel's possession." 824 F. Supp at 1261.

The problem presented by this case is a pervasive one, both federally and in the states, and warrants this Court's attention. There is a pressing need for a ruling by this Court that prosecutors cannot circumvent *Brady* by the artifice of burying *Brady* materials, especially high-grade *Brady* materials, in thousands of pages of largely immaterial generic documents. There is further a need for a ruling by this Court that the prosecutor's constitutional *Brady* duty is not met by providing a defendant mountains of material from which he may or may not be able to mine critically exculpatory nuggets, especially where the prosecution knows the exculpatory quality of the documents, could readily make them known to the defendant, and knows (maybe intends) that the defendant will not find the documents on his own.

*Brady* embodies fundamental fairness which is important to the integrity of our criminal justice system. It should be upheld and preserved against every tendency or

temptation to corrode it in the way done here and done in the same way across the country every day.

This case presents the Court with an opportunity not only to require real *Brady* compliance in such cases as this, but also to make clear that prosecutors will not be permitted to offer and argue damaging evidence knowing, or at least believing, that the defendant was prevented from impeachment because his discovery of the impeachment material was frustrated by the prosecution's manner of purported *Brady* compliance or disclosure.

The problem presented by this case is a real and continuing problem in the administration of criminal justice and is a threat to *Brady*'s constitutional purposes. This case is an appropriate vehicle for badly needed rectification.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 03-15401-I

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ELLIS E. NEDER, JR.,

versus

Petitioner-Appellant,

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court for the Middle District of Florida

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(Filed Feb. 18, 2004)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

USA,

vs.

ELLIS E. NEDER, JR.

Defendant. /

Case No.
3:91-cr-175-J-20
3:01-cv-1455-J-20-HTS

**ORDER**

(Filed Aug. 22, 2003)

**I. Status**

This case is before the Court on the Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct the Sentence and Judgment of Conviction (Doc. No. 1228, filed December 26, 2001) in which he challenges his 1992 federal court conviction on the following grounds: (1) AUSA Kunz's pattern of prosecutor misconduct violated due process in Neder's trial; (2) AUSA Kunz violated his *Brady* obligations by failing to disclose "deposit issue" material; (3) AUSA Kunz knowingly used false testimony or should have known it was false; (4) AUSA Kunz violated his *Brady* obligations by failing to disclose an Army Corps of Engineers Memo; (5) AUSA Kunz violated his *Brady* obligations by failing to disclose evidence on the "nominee issue"; (6) AUSA Kunz used false testimony of Thomas Turner; (7) AUSA Kunz violated his *Brady* obligations by failing to disclose Michael Arington's 1986 W2; (8) AUSA Kunz elicited false testimony from lenders; (9) Judge Harvey E. Schlesinger miscarried justice in a variety of ways; (10) the jury instructions were improper as to the "omission fraud" charge; (11) ineffective assistance of trial

counsel; and (12) the secrecy and protection of the grand jury were violated.

The Government filed a Response to the Motion on February 19, 2002 (Doc. No. 1236). Thus, this case is ripe for review.

## II. Procedural History

Neder was indicted in 1991 for conspiracy to commit offenses against the United States, mail fraud, wire fraud, bank fraud, tax fraud, racketeering, conspiracy to commit racketeering, and making false statements to federally insured lenders. These eighty one counts stemmed from a real estate scheme undertaken by Neder.[1] A jury convicted Neder on seventy three counts. This Court sentenced Neder to a term of imprisonment of twelve years and three months followed by a five year term of supervised release.

The Eleventh Circuit affirmed Neder's conviction in its entirety on March 19, 1998. *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998). Neder then petitioned for a writ of certiorari as to the convictions on the mail, wire, bank, and tax fraud counts. The Supreme Court granted certiorari then affirmed in part and reversed in part. *United States v. Neder*, 527 U.S. 1 (1999). On remand, the Eleventh Circuit affirmed Neder's conviction in its entirety. *United States v. Neder*, 197 F.3d 1122 (11th Cir.

[1] The facts of this case have been thoroughly examined by the Eleventh Circuit and the Supreme Court. *Neder v. United States*, 527 U.S. 1 (1999); *United States v. Neder*, 197 F.3d 1122 (11th Cir. 1999); *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998). This Court declines to rehash these facts yet again.

1999). Neder filed a writ of certiorari which the Supreme Court denied.

Neder then filed several motions in this Court for a new trial. The motions were denied by this Court and Neder appealed to the Eleventh Circuit. The Eleventh Circuit affirmed this Court's decision denying a new trial. Neder now files this Motion to vacate, set aside, or correct his judgment of conviction pursuant to 28 U.S.C. § 2255.

Also before the Court is Neder's Motion for the Court to Consider the Fact that the FBI has Located Government Suppressed and Prosecutor Concealed Exculpatory Documents in the Grand Jury Records (Doc. No. 1242, filed October 21, 2002). The Motion is **DENIED**. Neder argues that the seven documents identified as responsive to his document request are *Brady* material. These documents are several among thousands of documents that were made available to Neder before trial. Apparently Neder believes that the Government should have culled out these documents and personally handed them to Neder before trial. These documents were never hidden from Neder.

Neder maintains that the documents at issue contradict Thomas Turner's testimony and therefore the prosecutor intentionally submitted perjured testimony. This argument is without merit, though, because there is no way for the prosecutor to know before trial that a document may contradict testimony at trial before the witness has even testified. *Brady* requires the Government to turn over any *favorable* evidence to the defendant before trial if it is known to be *Brady* material at that time or when its existence during trial becomes known. If evidence is *Brady* material, then it must be produced; if it is not *Brady*

material then it does not need to be disclosed. After any government witness testifies at trial, then the Government has an obligation under *Jencks*, 18 U.S.C. § 3500, to turn over any statements by the witness so they can be used to impeach his testimony. There is a substantive difference between *Brady* and *Jencks* material, a distinction that Neder does not seem to appreciate. The material that Neder alleges the Government withheld from him not only was *not* withheld but does not contradict any testimony at trial.

## III. Standard of Review

A prisoner may move the sentencing court to vacate, set aside, or correct the prisoner's sentence if the sentence imposed was done so in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255. No hearing is required when the Court concludes that the motions, files, and records show that the prisoner is entitled to no relief. *Id.*

## IV. Findings of Fact and Conclusions of Law

As an initial matter, the Government argues that Neder's 2255 Motion is time barred because Neder filed the Motion outside the one year statute of limitations. The Court agrees with the Government's general proposition that a defendant must file a § 2255 motion within one year from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(1). On May 31, 2001, before the one year deadline arrived and while Neder was still serving his sentence, Neder filed a motion to extend the filing deadline by six months for his 2255 Motion claiming that cataracts inhibited his eyesight and made it impossible for him to

work on his 2255 Motion and he would be out of prison before the extension of the filing deadline. While the Government opposed the Motion, this Court granted the Motion and allowed Neder an additional six months to file his 2255. (Doc. No. 1226, filed June 21, 2001). The Government now argues that not only did this Court improperly grant the extension but had no jurisdiction to do so and Neder's Motion is therefore time barred.

The Government advances two main arguments to support its position that Neder's Motion is time barred. First, the Government argues that Neder's circumstances were not of the sort that justified an equitable tolling of the statute of limitations. The Government cites to *Sandvik v. United States*, 177 F.3d 1269, 1271-1272 (11th Cir. 1999) as an example of when it is inappropriate to equitably toll the statute of limitations. Sandvik's 2255 motion was late because his counsel mailed it through ordinary mail one day before it was due. *Id.* The 2255 arrived after the filing deadline and the Eleventh Circuit held that the statute of limitations was not tolled because counsel had other mailing methods available for making sure the motion arrived before the deadline. *Id.*

The Government also cites *Akins v. United States*, 204 F.3d 1086, 1089-90 (11th Cir. 2000) where the Eleventh Circuit declined to equitably toll the statute of limitations when the Defendant was in lockdown for the seven months prior to the filing deadline for his 2255 and misplaced legal papers were not returned to him until after the filing deadline. The court reasoned that Akins had had years to prepare his 2255 prior to his lockdown and he was not prevented by extraordinary circumstances from filing on time. *Id.*

While it is clear that an equitable tolling of the statute of limitations is justified only in extraordinary circumstances, the Government argues that Neder's problems with his eyesight do not rise to the level of the extraordinary circumstances required by the Eleventh Circuit. In fact, the Government argues that Neder's eyesight excuse is merely a pretext for getting an extension for his filing deadline. However, the Court declines to engage in a fact finding expedition as to the extent and veracity of Neder's claims about his eyesight. The Court chose to err on the side of caution and allow Neder the opportunity to attack his sentence one last time. Neder's circumstances are distinguishable from those in *Sandvik* and *Akins* because where those defendants had control over the circumstances that prevented their filing (i.e. when he mailed it or engaging in behavior that resulted in a lockdown), Neder presumably had no control over and could not foresee the severity or the onslaught of his cataracts. Furthermore, this is not an equitable tolling issue because the Court granted the extension before the deadline.

Second, the Government argues that this Court had no jurisdiction to grant the extension because there was no case or controversy before the Court. According to the Government, this Court could not grant Neder additional time to file since his Motion for an extension did contain allegations supporting the merits of his claim for relief under 2255. However, the Government's only support for this argument is a case from the Second Circuit, *Green v. United States*, 260 F.3d 78 (2nd Cir. 2001). This Court is unaware of any Eleventh Circuit precedent that requires allegations supporting the merits of his claim for relief be contained in a motion to extend time to file, as the Court noted in its Order granting the extension. The purpose of

the extension was to allow Neder to properly raise these claims in a Motion.

**A. Ground One**

Neder sets forth twenty sets of facts to support his argument that AUSA Kunz has demonstrated a pattern of prosecutor misconduct. Each set will be considered in turn.

Neder first argues that AUSA Kunz is under investigation by the Florida Bar for prosecutorial misconduct in another case AUSA Kunz prosecuted and that this investigation shows that Kunz engaged in prosecutorial misconduct in Neder's case. However, the alleged misconduct in other unrelated cases is irrelevant and not proper grounds for a 2255 motion in this case. When evaluating prosecutor misconduct, this Court looks mainly to whether the defendant received a fair trial. *United States v. Crutchfield*, 26 F.3d 1098, 1099 (11th Cir. 1994). Since Neder's allegations involve Kunz's misconduct in a case other than Neder's, there is no concern that Kuntz's actions affected the fairness of Neder's trial. Therefore, this Court will only consider allegations of prosecutorial misconduct in Neder's trial.

Neder next asserts that AUSA Kunz withheld "deposit issue" documents and knowingly used a witness's false testimony. The Government did not knowingly use false testimony. Thomas Turner testified at trial as to the extent of Neder's motive for putting up the funds for the deposits on the properties. Neder testified at trial that he only put up the funds for deposit on the advice of his attorney, Turner. Turner, in his testimony, denied this. The evidence was used by Neder in the underlying case to show the strength of preconstruction sales to potential

lenders of construction funds. Had the lenders known that Neder was the one putting up the funds for deposit they may have been less likely to loan the money for the projects. However, assuming that Turner was lying, Neder puts forth no evidence to show that Kunz knew Turner was lying. Neder merely points out that there was conflicting testimony on the "deposit issue"; Neder testified that Turner drew up the condo documents for the project that allowed Neder to put up the deposits and Turner testified that he did not. There is no evidence to suggest that Kunz knew Turner's testimony was going to conflict with another witness's or that Turner's testimony was the untrue version.

Neder relies on *Napue v. Illinois*, 360 U.S. 264 (1959) for the proposition that Kunz violated Neder's due process by knowingly using false testimony. However, the holding of *Napue* does not apply to this case. The prosecutor in *Napue* failed to correct a government witness when the witness stated he was not receiving any consideration for his testimony when in fact the witness had been promised by the prosecutor that the prosecutor would make a recommendation for a reduction of the witness's sentence. *Id.* at 267. When the witness stated that he did not receive any consideration for his testimony, the prosecutor failed to correct him. *Id.* The Court held that the prosecutor's knowing use of false testimony may have affected the outcome of the trial and deprived the defendant of his due process. *Id.* at 271. In Neder's case, there was no use of false testimony because Neder fails to present evidence to support this claim. Kunz did not *know* that Turner's testimony was false. Kunz had no personal knowledge about the deposit issue unlike the prosecutor in *Napue* who had personal knowledge about any agreements he

made with the witness. Since there is no evidence to conclude that Kunz knowingly used false testimony, Neder's Motion is denied on this ground. *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) (finding that knowledge of falsity will not be imputed to the prosecutor when a key government witness's testimony is in conflict with another witness's testimony).

Neder next argues that AUSA Kunz violated his *Brady* obligation by not turning over to Neder 502 pages of documents that would have supported Neder's testimony on the "deposit issue." However, there is no evidence that the 502 pages of documents reveal any exculpatory evidence, and they were all made available to Neder during pretrial discovery in the underlying case. Nor did AUSA Kunz have an obligation to specifically identify those documents among the thousands of documents made available to Neder during that discovery phase of the underlying case. In fact, Neder created and possessed some of those documents himself. AUSA Kunz was required to turn over documents which the Government had that Neder did not. *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963). AUSA Kunz did that; he did not violate *Brady* by failing to red flag certain documents for Neder. His burden was met when he provided Neder access to all documents in this case and if Neder and/or his counsel failed to read these documents, that is not the prosecutor's fault.

As further evidence of AUSA Kunz using false testimony, Neder points to a March 1, 1988 Army Corps of Engineer memo that was never given to defense at trial. The memo concerns the delays at the Reddie Point project as a result of the archaeological find. However, the fact that there was an archaeological dig was never controverted at trial.

That evidence came in as a defense. Therefore, this document would not have strengthened Neder's position at trial because the Government never disputed that an archaeological find delayed the Reddie Point Project as Neder maintained at trial.

As to Neder's argument regarding the Chicago Title Binder and the two Turner draft contracts, this issue has already been raised on direct appeal and the Court of Appeals has addressed it. Therefore, it cannot now be raised in a 2255 motion. *Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir. 1990).

Neder next lists several other items that he alleges were wrongfully withheld from him. First is a letter from David Phillips about the collateral loan. There is no proof that AUSA Kunz had this letter and failed to turn it over. Furthermore, even if Kunz had the letter, Neder entered his letter in response to Mr. Phillips letter into evidence; this response letter would rebut Mr. Phillips "false testimony" and therefore Neder has suffered no injury. Second is the 1986 W2 of Michael Arington. Neder alleges that the W2 can be used to show who calculated Arington's salary. This piece of evidence is irrelevant because it is not possible for a W2 to show who calculated Arington's salary, it would only show what Arington's salary was for the year. Third, Neder refers to several civil settlement and release documents that were never produced by the Government. Neder argues that these documents prove the victims' losses were substantially lower than what AUSA Kunz submitted evidence of at trial. These release documents only show what Neder settled for or was released from paying in a civil trial. They in no way show the actual amount of money that Neder fraudulently obtained. The lending institutions may have been willing to settle for

less money in the civil cases than Neder actually got from them. A civil settlement or release documents have nothing to do with a defendant's culpability in a criminal trial. The documents Neder refers to are irrelevant.

Not only does restitution in civil cases have nothing to do with a victim's loss at the time of the crime, in addition, Neder was a party to the civil actions and took an active part in the cases. Therefore, Neder possessed all the documents and information that he claims Kunz never turned over to him. *Brady* only obliges the Government to turn over exculpatory evidence that the defendant does not possess. Since Neder possessed all these documents from being a party to the cases or knew of their existence and could have gotten them, the Government has no obligation to produce them. In fact, Neder does not even allege that the Government possessed these documents. There is no reason to believe that the Government had these documents and failed to turn them over even if it was obligated to; the Government cannot produce something it does not possess.

There is absolutely no merit to Neder's allegation that AUSA Kunz intimidated trial witnesses. Neder alleges that AUSA Kunz used a threatening manner with a witness at trial. However, the Court did not discern any threatening behavior towards the witnesses at trial. Neder also refers to the Government attempting to force Neder's CPA to adopt an untrue statement. However, Neder admits that his CPA ultimately filed an affidavit with the Government that he considered truthful and the "untrue" version was never used against Neder. So it appears that no untrue statements by Neder's CPA were used at trial or at any other time and therefore Neder has suffered no prejudice.

**B. Ground Two**

Neder's second ground to vacate or set aside his sentence is that AUSA Kunz knowingly used false testimony and failed to disclose exculpatory evidence to the defense on the "deposit issues." As the Court previously stated, there is no evidence to support the allegation that AUSA Kunz knew the testimony was false or that it even was false. *Michael*, 17 F.3d at 1385.

**C. Grounds Three through Six**

Neder's third through sixth grounds to vacate or set aside are meritless because they are merely restatements of previously raised arguments (Turner's allegedly false testimony and the alleged failure of AUSA Kunz to disclose the Army Corps of Engineers Memo).

**D. Ground Seven**

Neder's seventh ground to vacate or set aside his sentence is meritless for the reasons stated above – a W2 cannot speak to who set an employee's salary, it would only state what the salary was. *Brady* only requires that the Government produce evidence that is favorable to the defendant, 373 U.S. at 87, not that the Government produce every piece of evidence the defendant requests. Since the W2, as already found, would in no way have proven favorable to Neder, the Government did not violate *Brady* by failing to produce it to Neder.

**E. Ground Eight**

Neder next argues that AUSA Kunz elicited false testimony from the loan officers concerning the value of

their losses. Just as there was no evidence that AUSA Kunz knew that Turner's testimony was false, Neder presents no evidence that AUSA Kunz knew the loan officer's testimony was false or even that it was in fact false. *Michael*, 17 F.3d at 1385.

**G. Ground Nine**

In Neder's ninth ground for relief, he argues that Judge Schlesinger engaged in multiple instances of miscarriages of justice at Neder's trial. Not only is there no merit to any of Neder's allegations that the Court's actions constituted a miscarriage of justice, but this issue is not proper on a collateral appeal but should have been included as part of Neder's direct appeal. *Cross*, 893 F.2d at 1289. Neder makes no showing that he was unable to bring this claim on direct appeal and therefore it cannot be considered here.

**H. Ground Ten**

In Neder's tenth ground to vacate or set aside his sentence, he argues that the jury was not properly instructed on the definition of omission fraud. This is an issue that can only be raised on direct appeal and is not proper in a 2255 motion. *Cross*, 893 F.2d at 1289. In fact, Neder did raise this issue on direct appeal and the Eleventh Circuit found no error.

**I. Ground Eleven**

Neder's eleventh ground is ineffective assistance of counsel. To maintain an ineffective assistance of counsel claim, Neder must show that one, counsel's performance

was deficient and two, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Neder has not made either of these showings. He relies on his previous allegations of prosecutorial misconduct and forcing witnesses to testify falsely. Since the Court has already concluded that Kunz did not engage in either of these activities, Neder has failed to show that AUSA Kunz's "improper conduct" made it difficult for Neder's counsel to do his job properly. He does not point to any specific deficiency on the part of his counsel or explain how that deficiency prejudiced his defense. *United States v. Hilliard*, 752 F.2d 578, 580 (11th Cir. 1985) (finding no ineffective assistance of counsel where defendant failed to provide examples of evidence that could have been introduced or new lines of defense that could have been pursued).

**J. Ground Twelve**

As to Neder's twelfth and final ground to vacate or set aside his sentence, there is no evidence of his bold allegation that the grand jury records were tampered with or destroyed.

For the above stated reasons, Neder's 2255 Motion is **DENIED** in its entirety.

All other pending motions in the criminal case are now **MOOT**.

Accordingly, the clerk shall enter judgment against Neder in the civil case and close the civil file and the criminal case.

**DONE AND ENTERED** at Jacksonville, Florida, this 21st day of August, 2003.

/s/ [SIGNATURE]
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

Ellis Neder
U.S. Attorney
Garry Randolph, Courtroom Deputy
Law Clerk

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILE DIVISION**

**USA**

**Petitioner**

**v.**

**ELLIS E. NEDER, JR.**

**Defendant**

**Case No.**
**3:01-cv-1455-J-20-HTS**
**3:91-cr-175-J-20**

**JUDGMENT**
(Filed Aug. 25, 2003)

**IT IS ORDERED AND ADJUDGED** that pursuant to the Court's Order entered August 22, 2003, the Petitioner's motion to vacate, set aside or correct sentence, is hereby denied, and a judgment entered for the United States of America and against Ellis E. Neder, Jr..

SHERYL L. LOESCH, CLERK

/s/ Patricia Morawski
By: Patricia Morawski, Deputy Clerk

Date: August 25, 2003

Copies furnished to:

Counsel of Record
Unrepresented Parties

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## GOVERNMENT EXHIBIT #2

JACKSONVILLE FEDERAL SAVINGS AND LOAN ASSOCIATION
2107 HENDRICKS AVENUE
JACKSONVILLE, FL 32207-3309
12084 0 1 R 4
55 80-5-001056

DATE 12/31/86
PAGE 1

ROSE CREEK ASSOCIATION
LTD TRUST ACCOUNT
1001 BLACKSTONE BUILDING
JACKSONVILLE, FL 32202

01- 34569

MONEY MARKET ACCESS
ACCOUNT WILL PAY 6.65% AS OF
JANUARY FIRST
CIF# 303849

---

MONEY MARKET ACCESS ACCOUNT — CK ACCT # 34569 — P-001064
NOT TRANSFERABLE EXCEPT ON THE BOOKS OF THE DEPOSITORY INSTITUTION.

| DATE | DESCRIPTION | | | AMOUNT | BALANCE |
|---|---|---|---|---|---|
| | BEGINNING BALANCE | | | | 15,319.84 |
| 12/11 | DEPOSIT BY CHECK | | | 1900.06 | 17,219.90 |
| 12/24 | CHECK | # | 116 | 1,093.11- | 16,126.79 |
| 12/24 | CHECK | # | 115 | 1,093.16- | 15,033.63 |
| 12/24 | CHECK | # | 118 | 8,772.48- | 6,261.15 |
| 12/26 | CHECK | # | 119 | 1,163.58- | 5,097.57 |
| 12/31 | INTEREST FROM 11/29/86 THROUGH 12/31/86 | | | 82.13 | 5,179.70 |

AVG BAL $13,660 ; YIELD 6.65%

| | | | |
|---|---|---|---|
| ENDING BALANCE | | | 5,179.70 |
| ACCOUNT SUMMARY .... | | | |
| BEGINNING BALANCE | 11/30/86 | 15,319.84 | |
| 1 DEPOSITS | | 1,900.06 | |
| 4 WITHDRAWALS | | 12,122.33 | |
| INTEREST CREDITED TO ACCOUNT | | 82.13 | |
| ENDING BALANCE | 12/31/86 | 5,179.70 | |

| | | | |
|---|---|---|---|
| INTEREST | TO DATE | 1986 | 5,597.52 |
| TAX WITHHELD | TO DATE | 1986 | 115.35 |

GOVERNMENT EXHIBIT #2

| DATE | CHECK NUMBER | CHECKS ISSUED TO OR DEPOSIT RECEIVED FROM | AMOUNT OF DEPOSIT | | ✓ | AMOUNT OF CHECK | | BALANCE | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | 9905 | 55 |
| | | Mar. Ins. | 577 | 58 | ✓ | | | | |
| | | Apr. Ins. | 562 | 86 | ✓ | | | | |
| | | May | 552 | 94 | ✓ | | | | |
| | | June | 575 | 15 | ✓ | | | | |
| | | July | 563 | 34 | ✓ | | | | |
| 8/4/86 | | Deposit | 1000 | 00 | ✓ | | | | |
| | | Aug. | 503 | 63 | ✓ | | | | |
| | | Sept. | 484 | 35 | ✓ | | | | |
| | | Oct. | 353 | 99 | ✓ | | | 15078 | 39 |
| | | Transfer | 1900 | 06 | | | | 16978 | 45 |
| 12/4/86 | 115 | Ellis E. Neder, Jr., Attorney for Tom Turner | | | | 1093 | 16 | 15885 | 29 |
| 12/4/86 | 116 | " " For [Illegible] | | | | 1093 | 11 | 14792 | 18 |
| 12/4/86 | 117 | Saleva [Illegible] | | | | 4856 | 12 | 9936 | 06 |
| 12/4/86 | 118 | Robert Beckham | | | | 8772 | 48 | 1163 | 58 |
| 12/4/86 | 119 | Radeliff – [Illegible] | | | | 1163 | 58 | 0 | |

## GOVERNMENT EXHIBIT #3

| | | | |
|---|---|---|---|
| SALES PRICE | 86,000 | BUYER | Thomas Turner |
| TOTAL DWN PMT | 8600 | ADDRESS | 1904 Gulf Life Bldg. |
| MTG | 77400 | HOME PHONE | |
| % DOWN | 10 | WORK PHONE | |
| | | REALTOR | |
| | | COMPANY | |
| | | PHONE (WK) | HOME |

RESERVATION

DATE RESERVATION SIGNED BY BUYER _____ DATE SIGNED BY ELLIS _____

DATE RECEIVED $1,000 FROM BUYER _____ DATE SENT TO ELLIS _____

DATE SENT COMPLETE COPY OF RESERVATION BACK TO BUYER _____

CONTRACT

DATE CONTRACT SIGNED BY BUYER _____ DATE SIGNED BY ELLIS _____

DATE RECEIVED ADDITIONAL FUNDS _____ DATE SENT TO ELLIS _____

DATE SENT TO MORTGAGE CO _____

DATE SENT TO ATTORNEY _____

MORTGAGE
COMPANY NAME _____ PHONE# _____

MORTGAGE COM-
PANY PROCESSOR _____

DATE APPLICATION TAKEN ____

FOLLOW UP (DATE & DATA) _____

FOLLOW UP _____

FOLLOW UP _____

FOLLOW UP _____

FOLLOW UP _____

FOLLOW UP _____

DATE LOAN APPROVED _____

_____

ATTORNEY _____ PHONE _____

ADDRESS _____

PROCESSOR _____

_____

DATE & WHO ORDERED

TITLE INSURANCE CO. _____

SURVEY (included in condo documents) _____

TERMITE _____

PAYOFF _____

_____

CLOSING DATE _____

TIME _____

WHERE _____

_____

**GOVERNMENT EXHIBIT #4**

[ILLEGIBLE] REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THE CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 718.503, FLORIDA STATUTES, TO BE FURNISHED BY DEVELOPER TO BUYER.

CONDOMINIUM RESERVATION AGREEMENT

THIS AGREEMENT DATED THIS 9th day of August, 1984, by and between Rose Creek Associates, Ltd., ("Seller") and Thomas C. Turner ("Buyer") whose address is 1904 Gulf Life Tower, Jax, FL and whose telephone number is ___.

WITNESSETH:

For and in consideration of ~~the~~ mutual covenants and agreements contained herein, Seller agrees to reserve the following described condominium unit under the terms and conditions set forth herein.

1. Buyer hereby deposits with and makes payable to Escrow Agent, pursuant to and subject to the terms of the Escrow Agreement attached hereto as Exhibit "A", the sum of One Thousand Dollars ("1,000.00) for reservation of Unit No,. A-219, the approximate location of which is shown in the diagram attached hereto as Exhibit "B", said unit being a part of Rose Creek Condominium, a condominium which Seller proposes to build in Duval County, Florida.

2. Seller agrees with Buyer not to enter into a reservation deposit agreement or a binding purchase and sale

agreement with respect to the above-named unit with any other person until and unless this Agreement is terminated.

3. Seller shall be obligated to file all condominium documents required by Chapter 718, Florida Statutes, with the Florida Land Sales Division, prior to entering into a binding purchase and sale agreement with Buyer.

4. Buyer shall have the right to receive all condominium documents as required by Chapter 718, Florida Statutes.

5. Buyer shall have the right to an immediate, full and unqualified refund of the reservation deposit upon written request to the Escrow Agent by Buyer or Seller.

6. The Escrow Agent, as listed in the attached Escrow Agreement, is Turner & Ford, P.A., 1904 Gulf Life Tower, Jacksonville, Florida 32207.

7. Buyer shall obtain a receipt for the above-referenced reservation deposit and any additional deposit made pursuant to the terms hereof from Escrow Agent.

8. Purchase Price and Method of Payment:

The purchase price of the above-referenced condominium unit shall be $86,000, payable as follows:

(a) $ 1,000 reservation deposit;
(b) $ 7,600 paid to Seller upon execution of a biding purchase and sale agreement;
(c) $ N/A additional deposit to be paid to Seller on or before ___; and
(d) $ 77,400 payable at closing and delivery of deed.

**GOVERNMENT EXHIBIT #5**

November 16, 1984

Mr. Thomas Turner
1904 Gulf Life Tower
Jacksonville, Florida 32207

Re: Rose Creek

Dear Tom:

Sandra McDaniel, our Real Estate Broker, will be meeting with you to assist you in your condominium purchase at Rose Creek. We enclose the following for your review:

(1) Condominium documents (bound volume);

(2) Deposit Receipt and Purchase and Sale Agreement;

(3) Mortgage application from Florida Federal. If you are planning to finance your purchase through our special financing at Florida Federal, you need to begin completion of this application.

Sandra or someone from her office will be glad to assist you in answering any questions you have concerning the enclosures and help you in the preparation of the same. They will also assist you with your choice of interior selection, selection in option choices and finalizing the contract to purchase your unit.

Carpet, wall covering and other interior selections are now available for your review.

Sandra will give you a call next week to meet with you and finalize your Contract to Purchase.

Best regards,

Ellis E. Neder, Jr.

EEN:jfb
Enc.
cc: Sandra McDaniel

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**GOVERNMENT EXHIBIT #6**

*McDaniel*
*Moreau Inc.*
*Realtors®*

**DISCLOSURE OF ESTIMATED BUYER'S EXPENSE**

Property: Rose Creek A-219 Date: _____

Name of Purchasers Thomas Turner

$ 86,000

* * *

Seller pays all closing cost. Loan origination fee not to exceed 3%

| | | |
|---|---|---|
| CLOSING EXPENSES | | $ _____ |
| PLUS PREPAID ITEMS/ESCROW | | |
| __ Mos. Hazard Insurance | @ $ ___ | _____ |
| 4 Mos. Tax Deposit | @ $ 90 | 360.00 |
| 1 FHA/MIP Insurance | @ $ 75 | 75.00 |
| Prepaid Interest | | 774.00 |

| | | | |
|---|---|---|---|
| TOTAL PREPAIDS | | | $ 1,159.00 |
| Add Down Payment | | | $ $8600 |
| TOTAL CASH REQUIREMENT | | | $ 9,759.00 |
| ~~Less Earnest Money Deposit~~ Condo startup fee | | | $ 100.00 |
| Total Cash Required For Closing | | | $ 9,859.00 |
| MONTHLY PAYMENTS | | | |
| Principal & Interest | $ 811.07 | Based on a | |
| Deposit For Hazard Ins. | $ _____ | mortgage of | |
| Deposit For Taxes | $ 90 | $ 77,400 | for |
| Deposit For FHA/MIP Ins. | $ 25 | 30 | years. |
| TOTAL MO. PAYMENT | $ 926.07 | At 12.25 | % |

This may vary due to the proration of rents, issues, insurance and interest on mortgage. It is understood that McDaniel & Moreau, Inc., REALTORS®, agents for the Seller will be paid their fee for professional services rendered by the seller upon closing of this transaction. This disclosure was made to the undersigned prior to the execution of the Purchase and Sale Agreement.

_____

_____ _____

Sales Associate Purchaser

**GOVERNMENT EXHIBIT #7**

**FOR OFFICE USE ONLY – DO NOT GIVE OUT**

**ROSE CREEK**
**SPECIAL PRICE LIST**

| TYPE | UNITS | | BEDROOMS/BATHS | PRICE |
|---|---|---|---|---|
| **Building 1** | | | | |
| A+ | 101 | (SOLD) (Scheffer) | | $88,000 |
| A+ | 102 | (SOLD) (Chandler) | | 90,000 |
| B | 103 | | 2/2 | 96,000 |
| B | 104 | (SOLD) (Jurkovac) | | 77,500 |
| B | 105 | (MODEL) | 2/2 | 96,000 |
| B | 106 | (SOLD) (Childers) | | 77,500 |
| C | 107 | (SOLD) (Trad) | | 85,000 |
| B | 203 | | 2/2 | 96,000 |
| B | 204 | | 2/2 | 96,000 |
| B | 205 | | 2/2 | 96,000 |
| B | 206 | | 2/2 | 96,000 |
| A | 207 | (MODEL) | 2/2-1/2 | 107,000 |
| A+ | 208 | (SOLD) | 2/2-1/2 | 110,000 |
| B | 303 | | 2/2 | 96,000 |
| B | 304 | | 2/2 | 96,000 |
| B | 305 | | 2/2 | 96,000 |
| B | 306 | | 2/2 | 96,000 |
| **Building 2** | | | | |
| A+ | 109 | (SOLD) (Moreau) | | 76,000 |
| C | 110 | (SOLD) (Strickland) | | 86,000 |
| B | 111 | | 2/2 | 96,000 |
| B | 112 | | 2/2 | 96,000 |
| A | 209 | (SOLD) | 2/2-1/2 | 107,000 |
| A | 210 | (SOLD) | 2/2-1/2 | 107,000 |
| B | 211 | | 2/2 | 96,000 |
| B | 212 | | 2/2 | 96,000 |
| B | 311 | | 2/2 | 96,000 |
| B | 312 | | 2/2 | 96,000 |

**Building 3**

| | | | | |
|---|---|---|---|---|
| B | 113 | | 2/2 | 96,000 |
| B | 114 | (SOLD) (Thomy) | | 75,500 |
| B | 115 | (SOLD) (Beckham) | | 75,500 |
| B | 116 | | 2/2 | 96,000 |
| B | 117 | | 2/2 | 96,000 |
| B | 118 | (SOLD) (Bales) | | 75,500 |
| C | 119 | (SOLD) (Arington) | | 85,000 |
| B | 213 | (SOLD) (Lowry) | | 76,000 |
| B | 214 | (SOLD) (Baker) | | 82,500 |
| B | 215 | (SOLD) (Traer) | | 75,500 |
| B | 216 | | 2/2 | 96,000 |
| B | 217 | (SOLD) (Wareh) | | 75,500 |
| B | 218 | (SOLD) (Pickard) | | 75,500 |
| A | 219 | (SOLD) (Turner) | | 86,000 |
| A+ | 220 | (SOLD) (Trad) | | 88,500 |
| B | 313 | (SOLD) (Saba-Tannous) | | 83,000 |
| B | 314 | | 2/2 | 96,000 |
| D | 315 | | 3/2-1/2 | 117,000 |
| D | 316 | | 3/2-1/2 | 117,000 |
| D | 317 | | 3/2-1/2 | 117,000 |
| D | 318 | (SOLD) (Neder) | | |

OWNER OCCUPIED 5% DOWN – PRICE SUBJECT TO CHANGE WITHOUT NOTICE. SELLER PAYS ALL CLOSING COSTS EXCEPT PREPAIDS.

COVERED PARKING – $4,500 PER SPACE

(8/22/85)

8-28-85